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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Federal-State Joint Board) CC Docket Nos. 97-21, 96-45
Universal Service)
Universal Service Worksheet)
)

MOTION FOR STAY OR FOR EXTENSION OF TIME

Metrocall, Inc. ("Metrocall"), by its attorneys and pursuant to Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, hereby respectfully requests a stay of the March 31, 1998 deadline for completing and filing Universal Service Worksheets ("Worksheet"). Alternatively, Metrocall requests a thirty-day extension of time for carriers to file their Worksheets, to allow the Commission to address questions concerning the propriety of the administration of the schools and libraries fund and the rural health care fund. In support thereof, the following is respectfully submitted:

Background.

More than sixty parties filed petitions for reconsideration of the FCC's Universal Service Report and Order, 12 FCC Rcd. 8776 (1997) and subsequent orders in this docket; some twenty other parties have sought judicial review of the Report and Order. Although the FCC has addressed some of the contentions raised on reconsideration, reconsideration remains pending on many other issues. See Fourth Order on Reconsideration in CC Docket No. 96-45 and Report & Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, FCC 97-240, ¶ 6 (released Dec. 30, 1997) ("Fourth Recon. Order").

By order of July 18, 1997, the FCC ordered the National Exchange Carrier Association,

Inc. ("NECA"), to establish an independent, not-for-profit subsidiary, namely the Universal Service Administrative Company ("USAC"), to administer certain aspects of the USF. *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service, Report and Order and Second Order on Reconsideration*, 12 FCC Rcd. 18, 400 (released July 18, 1997) ("NECA Order"). That same order required NECA to create two independent, not-for-profit corporations, the Schools and Libraries Corporation ("SALC") and the Rural Health Care Corporation ("RHCC"), to administer those respective funds.

Although collection of contributions for the USF has commenced, the process by which USF contributions are collected, distributed and returned when paid erroneously is in doubt. By letter of February 10, 1998, the General Accounting Office ("GAO"), in response to an inquiry by Senator Ted Stevens (R-AK), stated that the FCC's creation of SALC and RHCC violated the Government Corporation Control Act, 31 U.S.C. §§ 9101-9110.

Good Cause Exists for Granting a Stay.

The Commission may grant a stay pending review of a petition for reconsideration following a showing of "good cause." See 47 C.F.R. §1.429(k). That standard is more flexible than the judicial standard for obtaining injunctive relief. For instance, the FCC may grant a stay pending reconsideration even where the petitioner has *not* shown any likelihood of success on the merits. See, e.g., Angeles Broadcasting Network, 59 R.R. 2d 758 (1985) (stay granted to avoid interruption of service to the public despite agency conclusion that petition lacked merit). In other cases, the Commission has granted a stay though there was no showing of "irreparable injury", which is typically necessary to obtain a judicial injunction. See Lompoc Valley Cable

TV, 1 R.R. 2d 1081 (1964) (stay granted due to "policy questions" raised by the petitioner).

These authorities hold that the FCC need not apply any rigid "test" or "formula" to grant a stay. Each stay request should be reviewed on the merits, with a stay granted when there is a sufficient showing of "good cause". Metrocall's stay request meets these FCC standards.

Moreover, the Commission is empowered to grant extensions of time, and its "procedural rules are often waived, so long as orderliness [of a proceeding] is preserved." Service Broadcasting, Inc., 46 R.R. 2d 413, 416 (1979).

"Good cause" exists to postpone the March 31, 1998 Worksheet filing deadline, since the creation of at least two of the three fund administrators was beyond the FCC's authority. It is axiomatic that an agency may only act within the scope of the powers delegated to it by Congress. See, e.g., Louisiana Public Service Comm'n. v. FCC, 476 U.S. 355, 374 (1986) ("an agency may not confer power on itself"). An agency action that exceeds the scope of its delegated authority is void. Cf. id. ("an agency literally has no power to act ... unless and until Congress confers power upon it"). The Government Corporation Control Act provides that an agency may not create or acquire corporations to engage in governmental functions without an express delegation from Congress, 31 U.S.C. § 9102; no such express delegation was made by Section 254, or any other provision, of the Telecommunications Act of 1996 (the "Telecom Act").

Despite the GAO's ruling that the FCC lacked authority to order NECA to incorporate SALC and RHCC to act as fund administrators, the FCC has apparently not taken any steps to adopt an administration scheme for the portions of the USF entrusted to those entities that complies with the Government Corporation Control Act. The creation of the SALC and RHCC

was *ultra vires*, yet, carriers are being required to file extensive revenue data, which will be used to calculate contributions to an enormous subsidy scheme, which is largely being those two unlawfully-created corporations.

Not only is the current administration of the schools and libraries and rural health care funds beyond the FCC's authority, it will inflict unrecoverable costs upon carriers. The costs of the programs administered by SALC and RHCC are tremendous. Estimates provided by those entities and their parent, USAC, indicate that the cost of the Schools and Libraries Fund for the second quarter of 1998 will be \$325 million. See Proposed Second Quarter 1998 Universal Service Contribution Factors Announced, Public Notice, DA 98-413 (Com. Car. Bur., released February 27, 1998) (the "Second Quarter Contribution Notice"). The comparatively "small" Rural Health Care Fund is estimated to require \$25 million for the second quarter of 1998, id.; that is still "real money" to carriers, especially those who operate in competitive sectors of the telecommunications industry.

In adopting second quarter contribution factors for the funding of the Universal Service programs, the Common Carrier Bureau did not even address the impact of the GAO's determination upon the administration of these funds. In contrast to the Bureau's silence, Commissioner Furchtgott-Roth expressed concern not only about the "many concerns and questions about the propriety of" the schools and libraries and rural health care funds, but also the disproportionately high administrative costs claimed by SALC. See Second Quarter Contribution Notice, Separate Statement of Commissioner Harold Furchtgott-Roth at 1. It is manifestly unjust for the FCC to demand that carriers contribute enormous sums of money to programs managed by -- and pay for the administrative costs of -- entities whose very creation

violates federal law.

In short, there are serious legal and policy questions concerning the current USF administration scheme, and no overriding need to impose reporting and contribution costs upon carriers (and their customers) prior to the resolution of those questions. See generally, Second Quarter Contribution Notice, Separate Statement of Commissioner Harold Furchtgott-Roth.

A Stay would be Consistent with the Commission's Statutory Mandate.

Section 254 of the Telecom Act requires that the Universal Service support mechanisms adopted by the FCC be "specific, predictable and sufficient," 47 U.S.C. § 254(b)(5); and that those mechanisms be funded in an "equitable and nondiscriminatory" manner. 47 U.S.C. § 254(b)(4). Petitioners for reconsideration, petitioners for judicial review, and at least one member of the Commission itself have questioned the ability of the FCC's current Universal Service program to meet the Telecom Act's requirements. See, e.g., Fourth Recon. Order, Separate Statement of Commissioner Harold Furchtgott-Roth at 1.

The FCC's January 1, 1998 "deadline" to implement the new Universal Service mechanisms was not mandated by the statute. Id. at 2. For the past year, Congress has hardly been delighted with the FCC's implementation of the Universal Service program. See, e.g., Second Quarter Contribution Notice, Separate Statement of Commissioner Harold Furchtgott-Roth at 1-2.¹ In the face of Congressional disapproval and ongoing litigation, there is surely reason to pause.

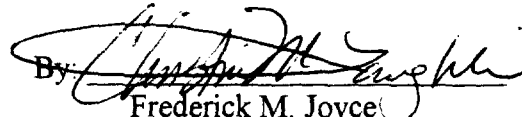
¹ See also Press Release, Universal Service Without Bureaucracies, Sen. John McCain (Feb. 11, 1998); Press Release, GAO Says FCC Overstepped its Bounds, Sen. Conrad Burns (Feb. 12, 1998).

Conclusion

For all the foregoing reasons, Metrocall respectfully requests that the Commission grant a this Request, and stay the Worksheet filing deadline until the issues concerning the administration of the schools and libraries and rural health care funds have been resolved.

Respectfully submitted,

Metrocall, Inc.

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CERTIFICATE OF SERVICE

I, Rhonda Johnson, a secretary with the law firm of Joyce & Jacobs, Attys. at Law, L.L.P., hereby certify that on the 27th day of March, 1998, copies of the foregoing Motion for Stay or for Extension of Time were delivered by hand to the following:

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